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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 276

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA; PERRY McCART, AS A MEMBER AND CHAIRMAN OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA; FRED BAYS, MOIE COOK, AS MEMBERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA; DEPARTMENT OF COMMERCE AND INDUSTRIES OF THE STATE OF INDIANA; HENRY F. SCHRICKER, AS CHIEF ADMINISTRATIVE OFFICER OF THE DEPARTMENT OF COMMERCE AND INDUSTRIES OF THE STATE OF INDIANA; M. CLIFFORD TOWNSEND, AS CHIEF EXECUTIVE OFFICER OF THE EXECUTIVE DEPARTMENT OF THE STATE OF INDIANA; DIVISION OF PUBLIC SAFETY OF THE EXECUTIVE DEPARTMENT OF THE STATE OF INDIANA; DONALD F. STIVER, AS SUPERINTENDENT OF STATE POLICE, DEPARTMENT OF STATE POLICE, DIVISION OF PUBLIC SAFETY AND DIRECTOR OF SAFETY OF THE DIVISION OF PUBLIC SAFETY, EXECUTIVE DEPARTMENT, STATE OF INDIANA; OMER S. JACKSON, AS ATTORNEY GENERAL OF THE STATE OF INDIANA; CARROLL O. HOLLEY, AS SHERIFF OF LAKE COUNTY, INDIANA, AND FRED A. EGAN, AS PROSECUTING ATTORNEY OF LAKE COUNTY, INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

JURISDICTIONAL STATEMENT.

Statutory Provisions Sustaining Jurisdiction.

The Supreme Court of the United States has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Sections 345 and 380).

Statutes of Indiana, the Validity of which Are Involved.

This appeal involves the validity of Sections 6 and 7 of the "Motor Vehicle Act of the State of Indiana" (Chapter 287, Page 1412 of the Acts of 1935, enacted by the General Assembly of the State of Indiana), as interpreted and administered by the Public Service Commission of the State of Indiana.

Section 6 (the pertinent part only) reads as follows:

> "No common carrier, except as herein provided, shall operate motor vehicles upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until after there shall have been obtained from the public service commission a certificate as defined herein, and no certificate shall be issued, except as hereinafter provided until after a public hearing and a consideration of the service, if any, rendered in the territory of the proposed motor vehicle operations by other common carriers; whether by motor vehicle, steam or electric railroad or otherwise * * *."

Section 7 reads as follows:

> "(a) Upon the filing of an application for a certificate as herein defined, the commission shall, within a reasonable time, fix a time and place for public hearing thereon, and the place for hearing shall be in the city of Indianapolis, unless otherwise ordered by the commission. A copy of the notice of hearing shall be mailed to the applicant at the address set out in the application at least ten days before the hearing and any person interested in such proceedings may appear in person or by attorney and offer evidence in support of or in opposition to the application and with or without the filing of formal pleadings.
>
> (b) The applicant shall, at all times, have the burden of proving, by a preponderance of the evidence, except as hereinbefore provided, that public convenience and

necessity requires the proposed operation, and that the proposed operation will not unreasonably impair the existing public service of any authorized common carrier, or common carriers by motor vehicle, or by railroad, steam or electric, then adequately serving the same territory.

(c) If the Commission shall find from the evidence and from such additional investigation as the commission shall cause to be made that public convenience and necessity exists for the service proposed, or any part thereof, the application shall be granted, subject to such terms, restrictions and limitations as the commission may determine, otherwise, the application shall be denied.

(d) In determining whether a certificate shall be granted the commission may, among other things, consider the following:

1. The financial ability of the applicant to furnish adequate service.

2. Whether existing transportation service is adequate.

3. The effect upon existing transportation, and, particularly, whether the granting of such application will or may seriously impair such existing service.

4. The volume of existing traffic over the route proposed by the applicant.

5. The effect and burden upon the highways and the bridges thereon, and the use thereof by the public.

6. Whether the operations will threaten the safety of the public or be detrimental to the public welfare."

Section 2 of said act is the section defining the terms used in the act. The pertinent parts of this section are as follows:

"When used in this act;

(a) The term person shall mean and include any individual or individuals, corporation, firm or co-part-

nership, their lessees, trustees and receivers appointed by any court whatsoever.

(b) The term 'commission' shall mean the public service commission."

• • • • • • •

"(d) The term 'public highway' shall mean any street, alley, road, highway and/or thoroughfare in this state used by the public."

• • • • • • •

"(f) The term 'motor vehicle' shall mean any truck, tractor, trailer, semi-trailer, motor bus or any self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting persons or property.

(g) The term 'common carrier' shall mean any person who or which undertakes to transport passengers or property, or any class or classes thereof, for the general public by motor vehicle for hire, whether over regular or variable routes."

• • • • • • •

"(i) The term 'certificate' shall mean the certificate of public convenience and necessity issued by the commission to common carriers, intrastate, or the certificate of authority issued by the commission to common carriers, interstate."

Section 4 of said act is the section declaring the purpose of the act which is set forth therein as follows:

"The business of operating as a motor carrier of persons or property for hire upon the highways of this state is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks, trailers and busses are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulations should be employed to the end that the highways may be rendered safer for the use of the gen-

eral public; that the wear of such highways may be reduced; that inconvenience to other users of the highways may be minimized (;) that minimum hindrance and stoppage to other users of the highways compatible with the needs of the public for adequate transportation service may be effected; that the highway may be safeguarded from improper or unnecessary usage; that operation by irresponsible persons or any other operation threatening the safety of the public or detrimental to the general welfare be prevented; that congestion of traffic on the highways may be minimized and the public highways may serve the best interest of the general public; that the various transportation agencies using the highways of the state may be regulated, adjusted, correlated and coordinated to the end that the public be given the benefit of the most economic and efficient means of transportation by any instrumentalities of transportation which may be suited to such purpose; that no legitimate form of transportation be stifled; that no form of motor transportation lawfully entitled to the use of the highway shall be denied the use thereof; that improvements in the arts be encouraged and through inventions and improvements in design and construction that the most satisfactory and expeditious transportation facilities may be provided for the use of the general public at fair and reasonable cost.

It is therefore declared to be the policy of the legislature of Indiana to promote, encourage, and regulate commerce by motor carriers so as to develop and maintain sound economic conditions for such carrier, promote the public interest, improve the condition and service of all agencies of transportation, and co-ordinate and regulate the same."

Section 5 of said act is the section vesting the power and authority to administer the act in the Public Service Commission. The pertinent parts of this section are as follows:

"The Commission is hereby vested with power and authority to supervise and regulate every motor carrier

subject to the provisions of this act, to fix just and reasonable rates, fares and charges, and to prescribe classifications, rules and regulations pertaining thereto, all of which shall be just and reasonable; to regulate and supervise the schedules, service, safety, methods and hours of operating the same."

* * * * * * *

"The commission shall have the power to hear all petitions, applications or motions filed with the commission. Such hearings may be conducted by the commission, by any member of the commission or by any examiner authorized by the commission. In case the hearing is conducted by an examiner, such examiner shall be required to promptly report to the commission the facts established by the evidence and to submit a suggested order, showing the findings and a decision therein, to the commission. Such orders recommended by such examiner shall be held for not less than ten days during which time interested parties may file written exceptions thereto. In case no exceptions are filed, the finding of facts and decision in form of order suggested by such examiner shall be the order of the commission unless the commission, in its discretion, directs otherwise.

After a decision, order or requirement has been made by the commission in any proceeding under this act, any party thereto may make application to the commission for reconsideration or rehearing of the same, or of any matter determined therein, and it shall be lawful for the commission, in its discretion, to grant such reconsideration or rehearing if sufficient reason therefor be made to appear. Applications for reconsideration or rehearing shall be governed by such rules and regulations as the commission may prescribe. If, after reconsideration or rehearing, it shall appear that the original decision, order or requirement is in any respect unjust and unwarranted, the commission may change or modify the same accordingly. Any decision, order or requirement made after such reconsideration or re-

hearing shall be subject to the same provisions as the original decision, order or requirement."

Section 29 of said act provides:

"Any person who violates any provisions of this act or the rules and regulations of the public service commission concerning motor vehicles for hire, * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than twenty-five dollars nor exceeding five hundred dollars."

Nature of the Case.

This is an appeal from the final decree and order of the District Court of the United States, Northern District of Indiana, South Bend Division, a Three-Judge Court composed of the Honorable Will M. Sparks and the Honorable Walter Treanor, Judges of the United States Circuit Court of Appeals, Seventh Circuit, and the Honorable Thomas W. Slick, Judge of the United States District Court, Northern District of Indiana, South Bend Division, entered and filed on June 29, 1939 in the cause entitled: Columbus and Chicago Motor Freight, Inc., Plaintiff vs. Public Service Commission of the State of Indiana, et al., Defendants, Equity No. 583.

Appellant, a common carrier by motor vehicle operating across the State of Indiana in interstate commerce only, filed its amended bill of complaint in said cause on the 15th day of November, 1937, praying for an interlocutory restraining order and, after hearing, a permanent injunction preventing the enforcement of the 'Motor Vehicle Act of the State of Indiana' by the Public Service Commission of the State of Indiana and other appellees, as administrative and enforcement officers of the State of Indiana, insofar as said act imposes upon appellant the obligation of obtaining a certificate from the said Public Service Commission au-

thorizing it to operate in interstate commerce only over (1) U. S. Highway 30 between the Ohio-Indiana line and Fort Wayne, Indiana, (2) Indiana Highway 2 between Fort Wayne, Indiana and Ligonier, Indiana, (3) U. S. Highway 6 between Ligonier, Indiana, and the junction of U. S. Highways 6 and 41, and (4) U. S. Highway 41 between the junction of said highways and the Indiana-Illinois line,—the said Public Service Commission having theretofore arbitrarily denied an application for a certificate to operate in interstate commerce only over said highways which was filed by appellant, as set forth in its amended bill of complaint.

Upon the filing and presentation of said amended bill of complaint, the District Judge granted and issued a temporary restraining order which remained in effect until it was dissolved on the 29th day of June, 1939 by the subsequently convened Three-Judge Court, constituted as set forth above.

Appellant contends that the 'Motor Vehicle Act of the State of Indiana', as administered and enforced by appellees, operates to deprive it of its property without due process of law and otherwise operates unconstitutionally, as specifically set forth in its amended bill of complaint filed in said cause and in its assignment of errors filed herewith.

Appellant also contends that said act, not being cooperatively administered, was superseded as to interstate commerce by the 'Motor Carrier Act, 1935,' enacted by Congress, under which appellant seasonably filed a proper application with the Interstate Commerce Commission.

Said cause was submitted to the Three-Judge Court on appellant's amended bill of complaint praying for a permanent restraining order and a declaratory judgment, appellees' motion to dismiss, a stipulation of counsel as to certain facts, and the evidence and exhibits introduced by appellant and appellees at the hearing of said cause.

The Three-Judge Court, by its final decree and order entered on the 29th day of June, 1939, dissolved the temporary restraining order theretofore issued by the District Judge and dismissed appellant's amended bill of complaint.

Subsequently, on the 27th day of September, 1939, appellant filed a motion for a new trial which was denied by said Court on the 21st day of February, 1940.

The judgment or decree to be reviewed was entered and filed on the 29th day of June, 1939. A copy thereof, and a copy of the temporary restraining order issued on the 15th day of November, 1937, are attached hereto. The petition or application for appeal to the Supreme Court of the United States was presented and filed on May 20, 1940.

The questions raised are substantial because they involve the constitutionality of the 'Motor Vehicle Act of the State of Indiana', as administered by the Public Service Commission of the State of Indiana, and the effect upon said act of the 'Motor Carrier Act, 1935' enacted by Congress. Appellant's entire business, depending as it does upon its use of the highways of Indiana, is also at stake.

Cases Sustaining the Jurisdiction of the Court.

The following cases, among others, are believed to sustain the jurisdiction of the Court:

Dickinson vs. *Stiles*, 246 U. S. 631, 38 S. Ct. 415, 62 L. Ed. 908; *First National Bank of Guthrie Center* vs. *Anderson*, 46 S. Ct. 135, 269 U. S. 341, 70 L. Ed. 295; *H. P. Welch Co.* vs. *State of New Hampshire*, 59 S. Ct. Rep. 438; Pa. *RR. Co.* vs. *Public Service Commission of Pa.*, 250 U. S. 566; *Atlantic Coast Line RR. Co.* vs. *Georgia*, 234 U. S. 280; *Napier* vs. *Atlantic Coast Line RR. Co.*, 272 U. S. 605; *Texas & Pac. Ry. Co.* vs. *Rigsby*, 241 U. S. 33; *Kelly* vs. *Washington*, 302 U. S. 1; *Sprouls* vs. *Binford*, 286 U. S. 374; *South Carolina State Highway Department* vs. *Barnwell Bros.*,

Inc., 303 U. S. 177; *Northern Pacific RR. Co.* vs. *Public Works Department*, 268 U. S. 39; *Blue Field Improvement Co.* vs. *Public Service Commission*, 262 U. S. 679; *Bell's Gap R. R. Co.* vs. *Pa.*, 134 U. S. 232; *Pa. Coal Co.* vs. *Mahon*, 260 U. S. 393; 43 S. Ct. 158; *Frost & Frost Trucking Co.* vs. *Railroad Commission*, 271 U. S. 583, 46 S. Ct. 605; 47 A. L. R. 457; *Smith* vs. *Cahoon*, 283 U. S. 553, 51 S. Ct. 582; *Prendergast* vs. *New York Telephone Co.*, 262 U. S. 43, 43 Supreme Court 466, 67 L. ed. 853; *Oklahoma Natural Gas Co.* vs. *Russell*, 43 Supreme Court 353, 261 U. S. 290, 67 L. ed. 659; *Hamilton* vs. *University*, 293 U. S. 245, 79 L. ed. 343; *Seaboard Air Line Railway Co.* vs. *Blackwell*, 244 U. S. 310, 37 Sup. Ct. 640; *Nashville, Chattanooga & St. Louis Ry. Co.* vs. *Walters*, 294 U. S. 405, 55 Sup. Ct. 486; *Ry. Commission of California* vs. *Southern Pacific Ry. Co.*, 264 U. S. 331, 44 Sup. Ct. 376; *Hall* vs. *DeCuir*, 95 U. S. 485; *South Covington & Cincinnati St. Ry. Co.* vs. *Covington*, 235 U. S. 537, 35 Supreme Court 158; *Kansas City Southern Ry. Co.* vs. *Kaw Valley Drainage District*, 253 U. S. 75, 34 Supreme Court 564; and *M. K. & T. Ry. Co.* vs. *Texas*, 245 U. S. 484, 38 Supreme Court 178.

Respectfully submitted,

PHILIP LUTZ,
ALVIN C. JOHNSON,
JOHN P. LUTZ,
LUTZ, JOHNSON AND LUTZ,
728-734 Circle Tower,
Indianapolis, Indiana.

May 20, 1940.

TAYLOR C. BURNESON,
3500 A. I. U. Building,
Columbus, Ohio,
Solicitors for Appellant.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

IN EQUITY. NO. 583

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA, PERRY MCCART, as a Member and Chairman of The Public Service Commission of the State of Indiana; FRED BAYS, MOIE COOK, as Members of the Public Service Commission of the State of Indiana; DEPARTMENT OF COMMERCE AND INDUSTRIES OF THE STATE OF INDIANA, HENRY F. SCHRICKER, as Chief Administrative Officer of the Department of Commerce and Industries of the State of Indiana; M. CLIFFORD TOWNSEND, as Chief Executive Officer of the Executive Department of the State of Indiana; DIVISION OF PUBLIC SAFETY OF THE EXECUTIVE DEPARTMENT OF THE STATE OF INDIANA, DONALD F. STIVER, as Superintendent of State Police, Department of State Police, Division of Public Safety and Director of Safety of the Division of Public Safety, Executive Department, State of Indiana; OMER S. JACKSON, as Attorney General of the State of Indiana; CARROLL O. HOLLEY, as Sheriff of Lake County, Indiana; FRED A. EGAN, as Prosecuting Attorney of Lake County, Indiana.

ORDER

Whereas, in the above entitled cause a verified amended bill of complaint for a perpetual injunction has been filed, and it having appeared from said amended bill that there is danger of immediate and irreparable injury, loss or damage being caused to the plaintiff before notice can be served and a hearing had thereon, unless said defendants are, pending such hearing, restrained as herein set forth, for the reason that the defendants and each of them are undertaking to enforce the provisions of the Motor Vehicle Act of the State of Indiana, as interpreted by the Public Service Commission against this plaintiff doing an interstate business exclusively by having the State Police and local officers stop its vehicles while engaged in interstate commerce and threatening the drivers thereof with arrest and have arrested drivers for the reason that the plaintiff is operating allegedly contrary to the laws of the State

of Indiana; that said defendants are enforcing said M
Vehicle Act of the State of Indiana according to their
interpretation thereof and are causing the vehicles of
plaintiff to be stopped on the highways in the State
Indiana, the drivers to be arrested and the prescribed
alties of the said Indiana Act imposed upon them when
such vehicles enter the State of Indiana and traverse
highways thereof in pursuance of plaintiff's interstate b
ness, thereby subjecting them to innumerable crim
prosecutions and to the imposition and payment of
heavy penalties prescribed by said law and restricting,
terfering with and placing unreasonable and unauthor
burdens upon interstate commerce. That said enforcem
as interpreted by the defendants is causing plaintiff i
parable damage and injury, loss of patronage, the dest
tion of its business and the loss of a substantial part o
capital invested in such business, for which it has no
quate remedy at law. That the plaintiff and its emplo
are being prosecuted in various counties in Indiana
one and the same alleged offense, namely, the alleged
lation of the Indiana Act, and the plaintiff is being
jected to great expense in the employment of counse
the preparation for the defense of said prosecutions.
the plaintiff is required to furnish bond, bear the exp
of its employees and their losses of time and the loss ca
by the interference with its business in defending the
and prosecutions and arranging for the release upon
of its servants, agents, employees and representati
That said prosecutions and threats of further prosecut
have interfered and are interfering with plaintiff's ob
ing business and carrying on its business, which is l
established. That continued prosecutions and threat
prosecution will involve great losses and injury to
plaintiff, without any opportunity of recovery.

Now Therefore, Take notice that you, Public Ser
Commission of the State of Indiana; Perry McCart,
member and Chairman of the Public Service Commis
of the State of Indiana; Fred Bays and Moie Cook, as m
bers of the Public Service Commission of the State of I
ana; Department of Commerce and Industries of the S
of Indiana; Henry F. Schricker, as Chief Administra

Officer of the Department of Commerce and Industries of the State of Indiana; M. Clifford Townsend, as Chief Executive Officer of the Executive Department of the State of Indiana; Division of Public Safety of the Executive Department of the State of Indiana; Donald F. Stiver as Superintendent of State Police, Department of State Police, Division of Public Safety and Director of Safety of the Division of Public Safety, Executive Department, State of Indiana; Omer S. Jackson, as Attorney General of the State of Indiana; Carroll O. Holley, as Sheriff of Lake County, Indiana, and Fred A. Egan, as Prosecuting Attorney of Lake County, Indiana, defendants herein, and each of you, your servants, agents, attorneys and counsellors, are hereby temporarily restrained and enjoined from attempting to enforce the said Motor Vehicle Act of the State of Indiana or any of the provisions thereof against the plaintiff, its agents, servants or employees.

This restraining order will remain in force until the further order of this or a three judge court.

Let a copy of this restraining order be attached to the subpoena herein and served herewith.

Dated this fifteenth day of November, 1937.

(Signed) THOMAS W. SLICK,
Judge, United States District Court.

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

In Equity No. 583.

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA ET AL.

Special Findings of Facts and Conclusions of Law Thereon.

The Court, having heard the evidence and argument of counsel for the parties, makes the following finding of facts in conformity with Equity Rule No. 70½.

(1). The complainant, Columbus and Chicago Motor Freight, Inc., is a corporation duly organized and existing under the laws of the State of Ohio, and is a resident of the State of Ohio.

(2). The defendants, Perry McCart, Fred Bays and Moie Cook are members of the Public Service Commission of Indiana; Henry F. Schricker is chief administrative officer of the Department of Commerce and Industries of the State of Indiana; M. Clifford Townsend is the Chief Executive Officer of the Executive Department of the State of Indiana; Donald F. Stiver is Superintendent of the State Police, Division of Public Safety and Director of Safety of the Division of Public Safety, Executive Department, State of Indiana, the Indiana State Police are vested with all necessary police power, under the Indiana Statutes, to enforce the provisions of the laws of the State of Indiana for the regulation and use of automobiles, motor vehicles and other vehicles; Omer S. Jackson is Attorney General of the State of Indiana, and by statute, is made general counsel of the Public service commission; Carroll O. Holley is Sheriff of Lake County, Indiana; and Fred A. Egan is Prosecuting Attorney of Lake County, Indiana. All of the defendants are residents of the State of Indiana.

(3). This is a suit in equity of a civil nature and the questions therein arise under the Constitution and laws of the United States. In the amended bill of complaint, the complainant seeks to enjoin and restrain the enforcement officers of the State from causing the arrest of employees of the complainant for violation of certain motor vehicle laws of the State of Indiana, and to restrain the officers from proceeding with certain criminal actions already commenced. The complainant claims a legal right, under the Federal Motor Carrier Act of 1935, to operate as a common carrier of property, interstate, for hire between Columbus, Ohio, and Chicago, Illinois, over the following route across the State of Indiana:

> "Over Highway No. 30 from the Ohio-Indiana State line to Fort Wayne, Indiana, then over Highway No. 2 to Junction with Highway No. 6, then over Highway

No. 6 to Junction with Illinois Highway No. 49, then over Illinois Highway No. 49 to Chicago, and return over same route."

(4). On October 17, 1934, the complainant received from the Public Utilities Commission of Ohio a certificate authorizing it to operate over certain routes in the State of Ohio in interstate commerce. Said routes included Highway No. 30 from points in Ohio to the Ohio-Indiana State Line.

Later, on June 14, 1935, the Public Utilities Commission of Ohio granted the complainant a certificate to transport property over irregular routes from any point within the State of Ohio to any point without the State of Ohio, except over Highways Nos. 2 and 6 between Lorain and Cleveland and on Highway No. 20 between Toledo and Ashtabula, and against furnishing the same kind of service furnished by steam or electric transportation companies, and against furnishing the same service of other motor transportation companies operating between fixed termini or over regular routes, and against operating with equipment not listed with the Commission and unless tax is paid thereon.

The Public Utilities Commission of Ohio is the state agency of Ohio with authority to authorize motor carriers to use the public highways of the State of Ohio and to regulate the operations of motor carriers and the complainant has been operating in Ohio under such certificates since October, 1934.

(5). On the 27th day of August, 1934, the complainant, Columbus and Chicago Motor Freight, Inc., filed its application with the defendant, the Public Service Commission of the State of Indiana for a certificate of authority to operate as a common carrier of property interstate over certain public highways and streets of the State of Indiana, including Highways Nos. 20 and 30. Said application came on for hearing on October 5, 1934, and the Commission after considering the proposed business of the applicant, found that the use of the highways over the route as proposed by applicant would increase the dangers to the traveling public and would constitute an undue burden on the highways and necessarily interfere with their use by the traveling

public. For the above reasons and in order to minimize the congestion of traffic on the highways, the application of the complainant was denied by the Public Service Commission.

(6). On January 17, 1935, the complainant filed another application with the Public Service Commission of Indiana, in its Cause No. 2537-M, applying for a certificate as a beginning operator to carry property as a common carrier over the following route:

> From the Ohio-Indiana State line on Highway No. 30 to Fort Wayne and then on Highway No. 2 to Ligonier, Indiana, and then on No. 2 or No. 6 to the junction of Highways Nos. 2 and 6 near Westville, Indiana, then on Highway No. 6 to Calumet Avenue in Hammond, Indiana, then north on Calumet Avenue to Indianapolis Boulevard, and then in a northwesterly direction to the Indiana-Illinois state line.

Such proceedings were had on application that it came on for hearing before the Public Service Commission on April 1, 1935 and the Complainant appeared by its attorney, and its president and vice-president, and introduced evidence the substance of which was that said complainant did not own any trucks in which it proposed to carry property interstate and that complainant had contracted with the "Motor Way" to carry its freight, but complainant asserted that it expected to lease trucks to operate over said route if granted a certificate. The trucks to be used were owned by private people who would receive seventy per cent of the freight charges and thirty per cent would be kept by the complainant corporation.

The Public Service Commission, having heard and considered the evidence and having investigated the traffic and the highway conditions, found that the applicant proposed to engage in interstate business between Columbus, Ohio, and Chicago, Illinois. The Commission further found that the applicant was seeking the use of certain public highways in the State of Indiana beyond the ordinary use of the same in furtherance of its private business and that the proposed operation was contrary to the public welfare of

the state and that, in as much as the property was already moving in interstate business, to deny the certificate of necessity and convenience would not unnecessarily interfere with interstate business. The application of the complainant in said cause was denied by the Commission.

Later, on April 12, 1935, the complainant filed its petition for reconsideration of said finding and order of the Commission and, on April 26, 1935, the petition for rehearing was overruled.

(7). On or about the 13th day of May, 1935, the complainant, by his attorney, tendered and offered to pay the Public Service Commission the amount of registration fees required by said Motor Carrier Act of Indiana and by the laws of the State of Indiana and he also offered the Bureau of Motor Vehicles of the State of Indiana to pay the weight tax of sixty cents per hundred pounds for each and all of the motor vehicles used by the complainant in its business. Each of the offers and tenders were refused by the Public Service Commission and by the Bureau of Motor Vehicles for the reason that the complainant had no authority to operate over the public highways of the State of Indiana on the routes asked by it across the State of Indiana, and its vehicles were not registered with the Public Service Commission.

The complainant, at the time of offering the fees for registration of the vehicles used by it, offered also to give to the Public Service Commission of Indiana a policy of insurance indemnifying the public against any loss that might be caused by the negligence of the complainant in the operation of motor vehicles on the public highways of the state. The Public Service Commission refused to accept said insurance policy for the reason that said complainant did not have any authority to operate over the highways of the State of Indiana.

(8). The laws regulating the operation of motor carriers for hire in the State of Indiana were enacted in 1925 and motor carriers operating for hire were declared to be public utilities and the Public Service Commission of Indiana was vested with authority to regulate motor carriers for

hire and, since such time, the authority to permit the operators of motor carriers for hire on the public highways of the State, and their regulation has been vested in the Public Service Commission of Indiana or its successor, the Public Service Commission.

(9). The present Motor Carrier Act is Chapter 287 of the Acts of 1935, and became effective May 1, 1935.

The Act provides in section 4 that the business of operating as a motor carrier of persons or property for hire upon the highways of the state, is a business affected with the public interest. Said statute contains the following further provision in Section 4 thereof:

"The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks, trailers and busses are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulations should be employed to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that inconvenience to other users of the highways may be minimized (;) that minimum hindrance and stoppage to other users of the highways compatible with the needs of the public for adequate transportation service may be effected; that highway may be safeguarded from improper or unnecessary usage; that operation by irresponsible persons or any other operation threatening the safety of the public or detrimental to the general welfare be prevented; that congestion of traffic on the highways may be minimized and the public highways may serve the best interest of the general public; that the various transportation agencies using the highways of the state may be regulated, adjusted, correlated and coordinated to the end that the public be given the benefit of the most economic and efficient means of transportation by any instrumentalities of transportation which may be suited to such purpose; that no legitimate form of transportation be stifled; that no form of motor transportation lawfully entitled to the use of the highway shall be denied the use thereof; that improvements in the arts be encouraged and through inventions and

improvements in design and construction that the most satisfactory and expeditious transportation facilities may be provided for the use of the general public at fair and reasonable cost.

"It is therefore declared to be the policy of the legislature of Indiana to promote, encourage and regulate commerce by motor carriers so as to develop and maintain sound economic conditions for such carrier, promote the public interest, improve the condition and service of all agencies of transportation, and co-ordinate and regulate the same."

By Section 5 of the Motor Carrier Act of 1935, the Public Service Commission was and is now vested with power and authority to supervise and regulate every motor carrier subject to the provisions of this Act. Section 6 provides as follows:

"No common carrier, except as herein provided, shall operate motor vehicles upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until after there shall have been obtained from the public service commission a certificate as defined herein, and no certificate shall be issued, except as hereinafter provided until after a public hearing and consideration of the service, if any, rendered in the territory of the proposed motor vehicle, steam or electric railroad or otherwise; *Provided, however,* That all certificates heretofore granted by the commission under acts repealed by this act, including those assigned by an individual or individuals to corporations and in which corporations said individual or individuals retain a controlling interest and under which certificates the holders are now legally operating shall continue in full force and effect as granted or amended except that in all other respects the holders of said certificates shall be subject to the provisions of this act: *Provided, however,* That nothing herein shall relieve such holders of said certificates from filing their applications and from registering their vehicles as by this act required and of paying the fees required for filing such applications as provided in section 34 hereof, and from paying the registration fees required for

such vehicles as provided for in section 35 hereof, and the commission may grant the application without a public hearing thereon: and *Provided, further,* That nothing herein shall prevent the commission from cancelling or revoking any such certificates for cause as otherwise in this act provided.

"Any person operating motor vehicles as a common carrier under a certificate issued by the commission prior to the effective date of this act, who fails to file with the commission, within sixty days from the taking effect of this act, his application for a certificate to operate motor vehicles under the provisions of this act shall be deemed to have surrendered his certificates heretofore issued by the commission and such certificate shall be terminated, cancelled, and revoked."

(10). Section 7 of said Motor Carrier Act provides in part as follows:

"(d). In determining whether a certificate shall be granted, the commission may, among other things, consider the following:

1. The financial ability of the applicant to furnish adequate service.

2. Whether existing transportation service is adequate.

3. The effect upon existing transportation, and, particularly, whether the granting of such application will or may seriously impair such existing service.

4. The volume of existing traffic over the route proposed by the applicant.

5. The effect and burden upon the highways and the bridges thereon, and the use thereof by the public.

6. Whether the operations will threaten the safety of the public or be detrimental to the public welfare."

Sections 22, 23, 24, 25 and 26 of said Motor Carrier Act provide as follows:

"Sec. 22. No person, as defined in this act, shall operate any motor vehicle over the highways of this state for hire

without first having obtained a certificate or permit from the commission so to do, and having obtained registration plate or card for each vehicle, as provided in this act."

"Sec. 23. Any certificate or permit, upon application of the holder thereof, in the discretion of the commission, may be amended or revoked in whole or in part, or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part for willful failure to comply with any provision of this act, or with any lawful order, rule or regulation prescribed by the commission, or with any term, condition or limitation of such certificate or permit."

"Sec. 24. The highway commission, upon the request of the commission, shall furnish information relating to the highway or highways designated in applications for certificates and permits filed with the commission as well as such other information as the commission may deem pertinent to any hearing."

"Sec. 25. The provisions of this act shall apply alike to persons engaged in the transportation of persons or property over the highways of the State of Indiana whether such transportation be interstate or intrastate, except in so far as this act may contravene the constitution or the laws of the United States."

"Sec. 26. Before any common carrier or contract carrier, intrastate or interstate, shall operate any motor vehicle upon any public highway in this state, he shall register the same with the commission and pay the registration fees provided in section 35 of this act."

(11). Section 27 of said Act provides that it shall be the duty of every non-resident common carrier to file and keep on file with the Commission a designation in writing of the name and post office address of a citizen and resident of the State of Indiana on whom service of notice or orders may be made.

Section 28 provides that the Commission shall have power and authority to designate from time to time the public highways as routes over which carriers subject to the provisions of this Act may or may not operate so as to prevent congestion and give safety to the persons or property upon

such public highways and provides for the enforcement of its orders.

(12). The Motor Vehicle Act of the State of Indiana provides in Section 39, that any corporation feeling itself aggrieved with any decision of the commission, might commence an action in any court of competent jurisdiction against the Commission to vacate or set aside any order or decision upon the ground that such order or decision is insufficient, unreasonable or unlawful. It is further provided that such action should have precedence over civil cases of a different nature pending in any such court and that such action to set aside or vacate the order of the Commission must be exercised within sixty days of the rendition of such decision or order of such Commission. The Complainant never commenced any such an action to set aside any order of the Public Service Commission made with respect to its right to operate within the State of Indiana.

(13). The Motor Vehicle Act of the State of Indiana, in Section 29, contains the following provision:

"Sec. 29. Any person who violates any provision of this act or the rules and regulations of the public service commission concerning motor vehicles for hire, or any person, whether carrier, shipper, or any officer, employee, agent or representative thereof, who shall knowingly offer, grant or give or solicit, accept or receive any rebate, consideration or discrimination in violation of any provision of this act, or who, by means of any false statement or representation or by the use of any false or fictitious bill, bill of lading, receipt, voucher, account, claim, certificate, affidavit, deposition, lease or bill of sale, or by any other means or device shall knowingly and wilfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this act for less than the rate, fare or charge, approved by the commission, or who shall knowingly and willfully, by any such means or otherwise fraudulently seek to evade or defeat regulations as in this act provided for motor carriers, shall be

deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than twenty-five dollars nor exceeding five hundred dollars."

The defendants, the Public Service Commission, and the State Police of the State of Indiana, are undertaking and attempting to enforce the provisions of the Indiana law as set out in this finding and to prevent complainant from operating motor vehicles for hire carrying on interstate or intrastate commerce across the State of Indiana over the above route and the defendants, at all times, have undertaken and are proposing to enforce the Motor Vehicle laws of the State of Indiana and to arrest the drivers and operators of any motor vehicle operated for hire without authority from the Public Service Commission of Indiana and the arrests of the drivers of the vehicles operated by the complainant in Indiana were made pursuant to authority of the State Police and the Public Service Commission in the discharge of their statutory duty.

(14). In an investigation by the State Highway Commission of the State of Indiana, it was found that from July 1, 1937 to March 1, 1938, there were 61 motor vehicle accidents, exclusive of those in cities of over 3,500 population, in which either a truck and a passenger car or two trucks were involved, and that such accidents comprised 25.1% of all motor carrier accidents over said route.

(15). The court further finds that in a traffic count conducted by the State Highway Commission of Indiana, during a period from July 1, 1936 to July 1, 1937, at certain stations along the route claimed by complainant, outside of cities, the annual average number of vehicles passing such stations in twenty-four hours appeared as follows:

Station No. 36 on State Highway No. 30, 24 miles east of Fort Wayne, Indiana, 5,797 vehicles.

Station No. 34 on State Highway No. 2, 2 miles west of Fort Wayne, 2,343 vehicles.

At other stations along said route the traffic count showed an average of from 2,347 vehicles to 1,639 vehicles in a 24 hour period.

(16). The Public Service Commission, defendant, in its administration of the provisions of the Motor Carrier Act, has granted permits and certificates to contract and common carriers and there were in force on November 1, 1937, authorizations to use said Highways, Nos. 6 and 2 and 30, or part of said highways, 271 interstate permits or certificates, and 103 intrastate permits or certificates. The number of vehicles having a right to operate over said highways was not given but said authorized carriers as of November 1, 1937 were fairly representative of periods before and after that date.

(17). The Public Service Commission, defendant, in refusing to grant certificates of convenience and necessity to the complainant, did not base its decision and order upon the question of convenience and necessity with respect to interstate commerce and did not discriminate against interstate commerce or place any undue burden on interstate commerce. The action and order of the Public Service Commission related solely to the use of the public highways of the State of Indiana, and to the safety and comfort of those who used the highways along the route claimed by complainant, as ordinary travelers and those carriers already enjoying and having authority to use said routes.

(18). On the 21st day of October, 1937, Harold R. Longwell, Ray Kaiser and Fern Buckingham and Leslie Foster and Don Wilson, who were driving trucks for the complainant and were engaged in driving motor vehicles in transportation of freight in interstate commerce, from Chicago, Illinois to Columbus, Ohio, through the State of Indiana, upon the public highways thereof, and while engaged in such transportation for the complainant, were each arrested by the Indiana State Police in Ligonier, Indiana, on the charge of operating motor trailers for hire through the State of Indiana without having said vehicles registered with the Public Service Commission of Indiana and without having authority from the Public Service Commission of Indiana to operate as common carriers of property.

Later, on October 26, 1937, and at other dates and times, drivers employed and operating for the complainant, were

also arrested at other places in the State of Indiana by the State Police on the Charge of operating motor vehicles for hire through the state and on the public highways thereof without having their vehicles registered with the Public Service Commission of Indiana. Said drivers were arraigned in courts of Mayors or Justices of the Peace and were required to give bond to answer said charges and said courts would have heard and proceeded with said causes, except for the temporary restraining order issued in this suit. It is the intention of the defendants to continue to enforce the Motor Vehicle Laws of the State of Indiana, and in making the arrests, the State Police were acting under authority of the State Motor Vehicle laws.

(19). The Federal Motor Carrier Act of 1935 became a law on August 9, 1935 and became effective October 1, 1935.

Prior to February 12, 1936, and within the time required by the Federal Motor Carrier Act, the complainant filed with the Interstate Commerce Commission, under Section 206 of such Act, known as the "Grandfather clause", an application to operate in accordance with said Section 206 of the Act.

Said application was numbered MC1470.

On the 22nd day of November, 1937, the Interstate Commerce Commission, Division 5, made the following order on the application of the complainant:

Order

At a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 22nd day of November, A. D. 1937.

No. MC 1470

Application of Columbus and Chicago Motor Freight, Inc., Columbus, Ohio

After due investigation:

It appearing, That the applicant in accordance with the requirements of Section 206 of the Motor Carrier Act, 1935,

including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle as set forth below, and that the said applicant was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance by the said applicant, prior to the effective date of this order, with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, and governing the construction and filing of common carrier rate publications, a certificate of public convenience and necessity shall be issued to the said applicant on the effective date of this order, or at such later date as the Commission may designate, authorizing it to engage in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities indicated, over regular routes, between fixed termini, and to and from intermediate points, as specified below:

Commodities generally, except those of unusual value, and except high explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

Between Columbus, Ohio, and Chicago, Ill.:

From Columbus over Ohio Highway 31 to Kenton, Ohio, thence over U. S. Highway 30S to Lima, Ohio, thence over Ohio Highway 65 to Cairo, Ohio, thence over U. S. Highway 30N to Delphos, Ohio, thence over U. S. Highway 30 to Ft. Wayne, Ind., thence over Indiana Highway 2 to junction U. S. Highway 6, thence over U. S. Highway 6 to junction Illinois Highway 49, thence over Illinois Highway 49 to Chicago, and return over the same route.

From Columbus over U. S. Highway 40 to Springfield, Ohio, thence over Ohio Highway 4 to Dayton, Ohio, thence over U. S. Highway 25 to Lima, thence to Chicago as specified above, and return over the same route.

All intermediate points.

It is further ordered, That in the event said applicant has not complied with said requirements, rules, and regulations on the effective date of this order, or at such later date as the Commission may designate, consideration will be given to the denial of such certificate and the dismissal of the application therefor.

And it is further ordered, That this order shall become effective the 22nd day of December, A. D. 1937, unless on the Commission's own motion or for good cause shown by applicant or any other party in interest it is otherwise ordered.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

Later, on the 21st day of December, 1937, the Interstate Commerce Commission ordered that the effective date of its order of December 22, 1937, be stayed pending the further action of the Commission.

On the 17th day of January, 1938, the Interstate Commerce Commission, Division 5, ordered that the matter of application of the Columbus and Chicago Motor Freight, Inc., for a certificate of Public convenience and necessity or permit, under Docket MC 1470, be referred to Joint Board No. 58 for hearing on the 14th day of February, 1938. Said application of the complainant was heard before the same Joint Board on February 14, 1938, and has not been decided or disposed of but is still pending before said Board.

(20). The Court finds that the complainant was not in bona fide operation by motor carrier over the route claimed by him across the State of Indiana, either on June 7, 1935 or at the time he made application to the Interstate Commerce Commission, and during all such times the complainant was making use of the Public streets and highways of the State of Indiana without any right or authority from the State of Indiana.

WILL M. SPARKS,
WALTER TREANOR,
THOS. W. SLICK.

CONCLUSIONS OF LAW

Upon the foregoing facts, the Court finds the law to be as follows:

1. The law of the case is with the defendants.

2. The complainant, as a motor carrier for hire, was not entitled to operate over the route claimed by it across the State of Indiana, and the complainant is not entitled to the interlocutory injunction as prayed for, and that the temporary restraining order heretofore granted without notice be dissolved and set aside.

3. That the action of the defendants in arresting or causing the arrest of the complainant did not violate any rights of the complainant under the Constitution or laws of the United States.

4. That the amended complaint of the complainant is without equity and should be dismissed.

5. That the costs in this case, taxed at $, should be taxed against the complainant.

Dated at South Bend, Indiana, this 29 day of June, 1939.

WILL M. SPARKS,
WALTER TREANOR,
THOS. W. SLICK.

EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

Equity No. 583

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA, ET AL.

The Court having heard the evidence and argument of counsel for the parties, and having this day filed Findings of Fact and Conclusions of Law,

It is Therefore Ordered that judgment be entered in favor of the defendants; that the temporary restraining order heretofore granted be dissolved; and that the amended complaint of the complainant be dismissed. Exception to complainant.

(Signed) WILL M. SPARKS,
Judge, U. S. Circuit Court of Appeals,
(Signed) WALTER TREANOR,
Judge, U. S. Circuit Court of Appeals,
(Signed) THOMAS W. SLICK,
Judge, U. S. District Court.

June 29, 1939.

EXHIBIT "D".

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Equity No. 583

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC., *Plaintiff,*

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA, ET AL.,
Defendants.

Motion of Columbus and Chicago Motor Freight, Inc., for a new trial denied.

Dated this 21st day of February, 1940.

(Signed) WILLIAM M. SPARKS,
(Signed) WALTER E. TREANOR,
(Signed) THOMAS W. SLICK.

FILED
JUL 24 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 276

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

STATEMENT OF APPELLEES DISCLOSING MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE UNITED STATES SUPREME COURT.

OMER STOKES JACKSON,
Attorney General of Indiana;
URBAN C. STOVER,
Deputy Attorney General,
Attorneys for Appellees,
State House, Indianapolis, Indiana.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 276

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF INDIANA.

STATEMENT OF APPELLEES DISCLOSING MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE UNITED STATES SUPREME COURT.

The appellees submit the following pursuant to Rule 12, Paragraph 3, of the United States Supreme Court, disclosing matters and grounds making against the jurisdiction of the Supreme Court of the United States.

1.

In order to bring this particular appeal within the reviewing jurisdiction of the Supreme Court of the United

States, the record must show that the unconstitutionality of a State statute was a substantial question in the District Court from which the appeal is taken.

Title 28, Sec. 380, U. S. C. A.

2.

The Indiana Motor Vehicle Law, which was the governing statute in the District Court, was not asserted to be unconstitutional. The question involved there was its interpretation by the Indiana Public Service Commission. The Commission maintained, that in its regulating power over vehicles operated for hire over public highways, it could condition the operation of such vehicles, and designate the routes over which they could or could not operate both intrastate and interstate carriers as highway conditions justified.

Appellant's Jurisdictional Statement Under the Heading "Statutes of Indiana, the Validity of which Are Involved."

3.

The Indiana statutes require motor vehicle carriers operated for hire to obtain authority from the Indiana Public Service Commission before operating over any State highway. Appellant in 1934 and again in 1935 applied under this statute to the Indiana Commission for a certificate to conduct a trucking operation over certain highways across the north end of the State. The vice-president of appellant then said that the freight it proposed to handle was being carried by another carrier and that the applicant (appellant) was not then operating in Indiana. Later, before the Interstate Commission, appellant claimed to have been operating in Indiana all the time, and therefore as a *bona fide* operator, had acquired "Grandfather rights" over the particular routes asked for.

The District court found that the appellant was not a *bona fide* operator in Indiana when he applied to the Interstate Commerce Commission.

(See Court's Finding No. 20.)

The Commission, on appellant's application, refused to grant certificates as asked for. The refusal was not based on any fact with respect to the transportation of interstate commerce. The Commission's orders refusing permits to operate over the particular routes were in the exercise of its authority over State highways and had to do with the safety of travel and the preservation of the roadways.

(See Order of Indiana Commission.)

The Indiana Motor Carrier statute provides for a court review of decisions of the Commission (Sec. 39 Indiana Motor Vehicle Law, copy with amended complaint). The appellant did not avail itself of that statutory remedy but allowed the Commission's orders to before final and, then, later, when the State undertook to prosecute for operating over certain routes without a certificate, this suit was brought in the Federal District court. The jurisdiction of a District court in this case was originally based on diversity of citizenship and that the amount in controversy exceeded Three Thousand Dollars ($3,000.00). The theory of the plaintiff (appellant) in the District court was that it was engaged in transporting freight in interstate commerce and for that reason it had a legal right to operate over any public highway in Indiana regardless of the State authorities.

The case in the District court, as originally filed, was not one for a three-judge court. The specially constituted court was assembled after the plaintiff filed its amended complaint and pressed for an interlocutory injunction to enjoin the State enforcement officers from prosecuting the drivers of

appellant's trucks. In the amended complaint, the contention of the appellant was that since the enactment of the Federal Motor Carrier Act of 1935, it (the appellant) was entitled to operate over any public highway in Indiana as a "bona fide" operator under the "Grandfather Clause" of the Federal Act (Section 206), and that having such a right, it was immune from State regulation.

The hearing at which evidence was introduced on March 11, 1938, was on the appellant's application for an interlocutory injunction. At that time the appellees' motion to dismiss the amended complaint was argued. The result was that on June 29, 1938, the three-judge court made a special finding of facts and a final decree dismissing the amended complaint.

Later, on September 27, 1939, the plaintiff filed a motion for a new trial asserting that newly discovered evidence justified a rehearing of the case. The motion for a new trial was overruled on February 21, 1940.

The appellees maintain:

First. That this suit before the District court was simply an action in which appellant undertook to have the Federal court review and set aside the order of the Indiana Commission on the ground that it was arbitrary, and unreasonable. It appears to us that if this Court has jurisdiction of this appeal, it has jurisdiction to review the discretionary order of any State administrative body, which, within the range of its discretion, grants or withholds authority for the use of State highways by motor vehicles operated for hire. We think the special finding of the court shows this.

Second. If this appeal is from the judgment of the court dismissing the suit on June 29, 1938, the motion for a new trial which went to the point of evidence in support of an interlocutory injunction, ought not be allowed to extend the time for taking the appeal beyond the three months limit.

Inasmuch as the amended complaint was dismissed, there was no logical reason in hearing additional evidence on a complaint which was found to be bad.

Third. If the appeal is from the ruling of the court denying the interlocutory injunction (see Court's Conclusion of Law No. 2), the question now is whether the showing made raised such a serious question that the enforcement of the State statute pending final hearing would inflict irreparable damage; and the presumption is with the decision of the specially-constituted court. There is no showing whatever that the court abused its discretion.

Fourth. In any theory of this appeal which has to do with the authority of the State regulating agency over its highways, this Court has under a much weaker showing, invariably sustained the authority of the State Commissions over the operation of interstate motor carriers.

Sproles v. *Binford*, 286 U. S. 374;
Bradley v. *Public Util. Comm. of Ohio*, 289 U. S. 92;
South Carolina v. *Barnwell Bros.*, 303 U. S. 177;
McDonald v. *Thompson*, 59 S. Ct. 176;
H. P. Welch Co. v. *New Hampshire*, 306 U. S. 79;
Eichholz v. *Public Serv. Comm. of Mo. et al.*, 59 S. Ct. 532;
Maurer et al. v. *Hamilton, Jr., et al.*, 60 S. Ct. 726.

This is especially true where the Federal agency has not "occupied the field" by granting to a motor vehicle carrier a certificate or permit to carry on in interstate commerce.

Eichholz v. *Public Serv. Comm. of Mo. et al.*, 59 S. Ct. 532, and cases there cited p. 5.

Fifth. It is not improper to say to this Court that the question of the right of appellant to engage in the business of interstate commerce is now pending before the Interstate

Commerce Commission on its docket #M. C. 1470. The Indiana Commission, an appellee here, is a party in that proceeding.

(See Special Finding of Fact #19.)

For the foregoing reasons, the appellees submit that the appellant has failed to show that the Supreme Court of the United States has jurisdiction of this appeal, and appellees therefore move to dismiss this appeal.

OMER STOKES JACKSON,
Attorney General of Indiana;
URBAN C. STOVER,
Deputy Attorney General,
Attorneys for Appellees.

FILED
NOV 6 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 276

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,
Appellant,

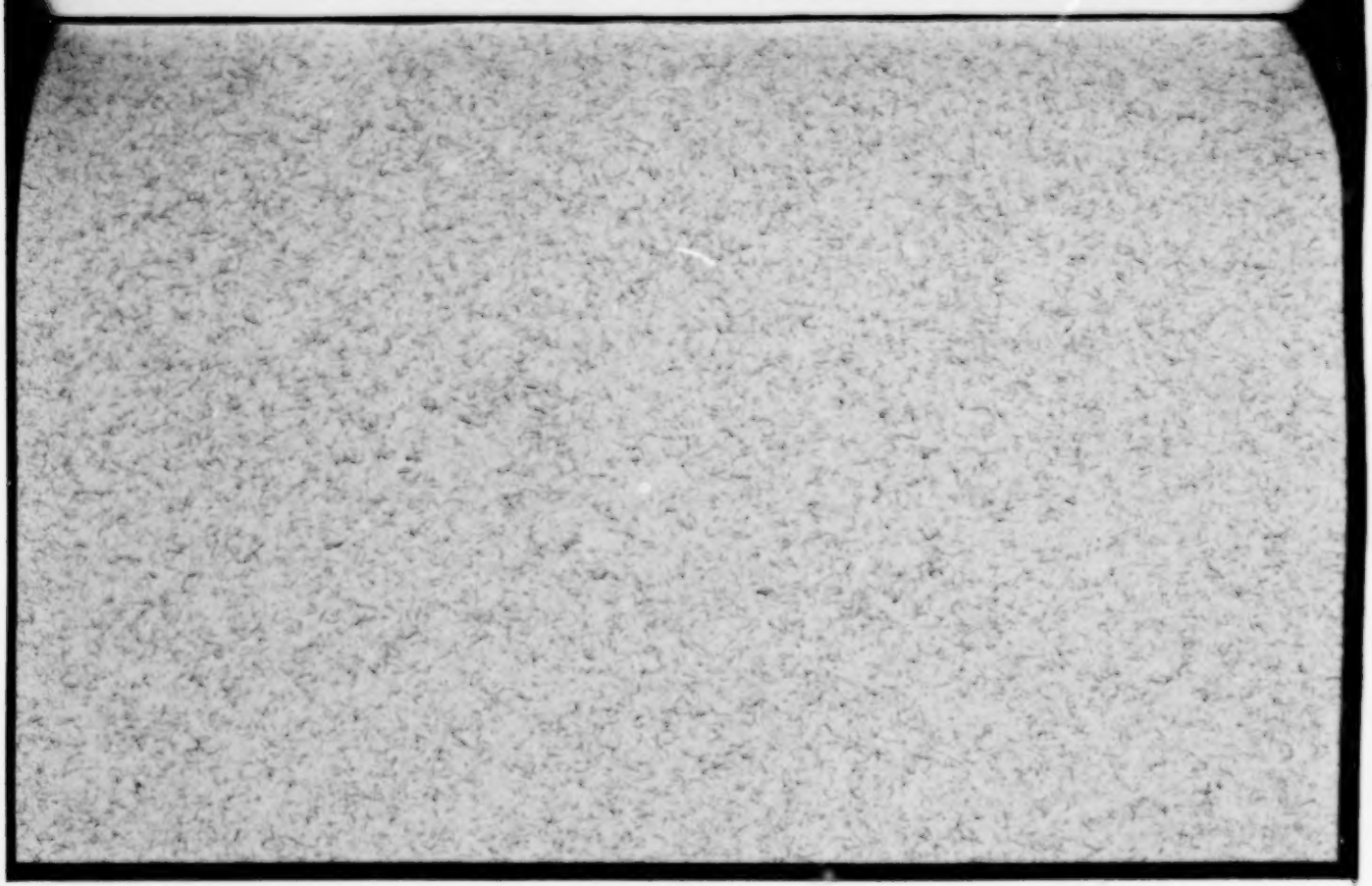
vs.

PUBLIC SERVICE COMMISSION OF INDIANA,
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

PETITION FOR REHEARING.

PHILIP LUTZ,
ALVIN C. JOHNSON,
JOHN P. LUTZ,
TAYLOR C. BURNESON,
Counsel for Appellant.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 276

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF INDIANA, ET AL.

PETITION FOR REHEARING.

Now comes appellant, Columbus and Chicago Motor Freight, Inc., and says that the Court, on October 14, 1940, entered the following order in the above-entitled case:

> "*Per curiam:* The judgment is affirmed. Hendrick *v.* Maryland, 235 U. S. 610; McDonald *v.* Thompson, 305 U. S. 263; Welch *v.* New Hampshire, 306 U. S. 79; Eichholz *v.* Public Service Commission, 306 U. S. 268."

Complaining of said order, appellant respectfully says that the cases which are cited therein are not decisive of the issues in the above-entitled cause for the following reasons:

I.

In the case of *Hendrick* v. *Maryland,* 235 U. S. 610, decided January 5, 1915, Hendrick, who resided in the

District of Columbia, challenged the validity of a Maryland statute requiring him to obtain a certificate from the commissioner of motor vehicles of that State. The court held that inasmuch as he had not applied for a certificate, he could not be heard to complain that the statute in question was arbitrary and unreasonable, and the court said that a mere inspection of its provisions would not warrant that conclusion.

The above-entitled case differs from the *Hendrick* case in that (1) appellant applied for a certificate as required by the Indiana statute in question, but was unable to obtain one because of the arbitrary and unreasonable action of the Indiana Commission and (2) the "Motor Carrier Act, 1935" (49 U. S. C. A. 304) had not then been enacted by Congress and the question of supersedure was not before the court for its consideration.

II.

In the case of *McDonald* v. *Thompson*, 305 U. S. 263, decided December 5, 1938, McDonald filed an application with the Texas Commission for a certificate to operate over certain Texas highways. The application was denied for the reason that said highways were congested and burdened with traffic. (This is not the reason for the denial of appellant's application filed with the Indiana Commission.)

The Texas Court of Civil Appeals upheld the Commission's order, and McDonald then applied for and obtained an order from the United States District Court restraining the Commission and Texas enforcement officers from interfering with his operations over the highways in question.

The Commission and the other defendants appealed to the Circuit Court of Appeals which reversed the District

Court, said Court finding that the Commission had acted within its constitutional and statutory powers. The Circuit Court pointed out, in doing so, that the Texas statute empowered the Commission to deny McDonald's application for the reason set forth in its order, and that no question had been raised concerning the reasonableness of the order.

McDonald then appealed to this Court which based its decision, not upon the reasonableness of the Commission's order, but upon the fact that McDonald was not entitled to receive a certificate from the Interstate Commerce Commission because he could not qualify under the "grandfather" clause of the "Motor Carrier Act, 1935".

The *McDonald* case, therefore, is not decisive of the above-entitled case because (1) the Texas Commission acted within its constitutional and statutory powers, whereas the Indiana Commission did not, (2) McDonald did not question the reasonableness of the order, whereas appellant does, and (3) the court did not pass upon the supersedure question which is one of the principal questions to be decided in the above-entitled case.

III.

In the case of *Welch* v. *New Hampshire*, 306 U. S. 79, decided January 30, 1939, this Court had under consideration a New Hampshire statute prescribing maximum hours of service for drivers, the alleged violation of which by The Welch Company resulted in the suspension of its registration certificates by the New Hampshire Commission.

The Welch Company, contending that the provisions of the New Hampshire statute had been superseded by the "Motor Carrier Act, 1935", first appealed to the New Hampshire Supreme Court which upheld the provisions of

the statute. It then appealed to this Court which held that the provisions of the statute had not been superseded by the "Motor Carrier Act, 1935" at the time in question, because the Interstate Commerce Commission, although it was empowered to prescribe maximum hours, had not yet done so.

The *Welch* case, therefore, is not decisive of the above-entitled case in that (1) the New Hampshire Commission acted within its constitutional and statutory powers, whereas the Indiana Commission did not, and (2) this Court did not pass upon the broad question of supersedure which is now before it in this case.

IV.

In the case of *Eichholz* v. *Public Service Commission*, 306 U. S. 268, decided February 27, 1939, Eichholz operated in interstate commerce over certain highways in Missouri, Iowa and Kansas. The Missouri Commission had a general rule in effect which was designed to prevent any carrier operating through Missouri under an interstate certificate issued by it from transporting a shipment from one point in the State to another point in the State, even though it be transported through some other State enroute between point of origin and point of destination.

Violating this rule, Eichholz transported shipments from St. Louis, Missouri to Kansas City, Missouri, by way of Kansas City, Kansas, and his interstate certificate was revoked by the Commission. Passing upon the validity of the Commission's order, the Court said:

> "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body

to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded.

"Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question.

"Rule 44 was plainly designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic. The rule simply sought to hold to his choice the one who had sought and obtained a permit exclusively for interstate transportation. Appellant was entirely free to conduct that transportation if he did not engage in the intrastate business for which he had deliberately refrained from qualifying himself. We cannot see that the rule on its face imposed any improper burden upon interstate commerce and the question is whether it did so through the application that the Commission has made of it."

The *Eichholz* case, therefore, is likewise not decisive because (1) Eichholz violated a valid rule governing his operations under a certificate issued by the Missouri Commission, whereas, the Indiana Commission is attempting to bar appellant from using its highways under any conditions, (2) the question of supersedure was not at issue in that case, whereas it is in this one, and (3) the constitutionality of the Missouri statutes was not challenged by Eichholz, whereas the constitutionality of the Indiana statutes, as administered by the Indiana Commission, is one of the principal questions before the Court in this case.

Wherefore, appellant respectfully petitions the Court for a rehearing of the above-entitled case.

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November 7, 1940.

Certificate of Counsel.

(Rule 33.)

I, Taylor C. Burneson, counsel for appellant, hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

TAYLOR C. BURNESON.

No. 276. COLUMBUS & CHICAGO MOTOR FREIGHT, INC. *v.* PUBLIC SERVICE COMMISSION OF INDIANA ET AL. Appeal from the District Court of the United States for the Northern District of Indiana. October 14, 1940. *Per Curiam:* The judgment is affirmed. *Hendrick* v. *Maryland*, 235 U. S. 610; *McDonald* v. *Thompson*, 305 U. S. 263; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Eichholz* v. *Public Service Commission*, 306 U. S. 268. *Mr. Philip Lutz, Jr.* for appellant. *Messrs. Omer Stokes Jackson*, Attorney General of Indiana, and *Urban C. Stover*, Deputy Attorney General, for appellees.